

**SANDLER, REIFF & YOUNG, P.C.**

50 E STREET, S.E., SUITE 300  
WASHINGTON, DC 20003

JOSEPH E. SANDLER  
sandler@sandlerreiff.com  
NEIL P. REIFF  
reiff@sandlerreiff.com

TELEPHONE: (202) 479-1111  
FACSIMILE: (202) 479-1115

COUNSEL:  
JOHN HARDIN YOUNG  
young@sandlerreiff.com

June 29, 2006

Jeff S. Jordan, Esq.  
Office of the General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: MUR 5743

Dear Mr. Jordan:

The undersigned represent Betty Sutton, Betty Sutton for Congress and David Joseph Quolke, as Treasurer (hereinafter referred collectively as "Sutton Campaign"). This matter was generated by a complaint filed by Thomas C. Sawyer, a primary opponent of the Sutton Campaign. Mr. Sawyer alleges that certain mailings undertaken by EMILY's List that expressly advocated the election of the Sutton Campaign were "coordinated" with the campaign. The Sutton Campaign denies any coordination with EMILY's List in connection with these mailings, and for the reasons stated below, the Commission should find no reason to believe that any violation of the Federal Election Campaign Act or the Commission's regulations occurred and close the file in this matter.

COMPLAINT'S ALLEGATIONS

The complaint in this matter makes three general allegations regarding the relationship between EMILY's List and the Sutton Campaign. Based upon these allegations, the complainants speculate that certain independent expenditures that supported the Sutton Campaign and opposed the complainant were coordinated between EMILY's List and the Sutton Campaign.

Allegation One – First, the complaint states that the EMILY's List "has been actively targeting Sutton's race and has specifically listed Betty Sutton and Betty Sutton for Congress prominently, upon the face of its website, providing biographical information about Betty Sutton...."

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

1 2006 JUN 29 P 2:47

27044154006

Allegation Two – The second allegation states that EMILY's List maintains a P.O. Box at the same UPS store as the Sutton Campaign at 1700 West Market Street, Akron, OH, a "store some sixty miles from the home of Betty Sutton."

Allegation Three – The third allegation derives from the use of pictures that appear to have been culled from the public website of the Sutton Campaign and used by EMILY's List in their mailings. The complaint alleges that the pictures used by EMILY's List are of a higher quality than those found on the campaign's website and then speculates that the only way EMILY's List could have obtained those pictures was by coordinating with the Sutton campaign.

As demonstrated below, each of the allegations made in the complaint are completely without merit and rebutted by the actual facts and through sworn affidavits provided by both the candidate, Betty Sutton, as well as the Campaign Manager of the Sutton Campaign, Anna Landmark. Although the campaign did have limited contacts with EMILY's List during the primary campaign, neither Ms. Sutton nor any staff member or agent of the campaign had any contacts with EMILY's List that would constitute "coordination" as defined by the Commission's regulations.

### LEGAL STANDARD

The FECA limits contributions from a multicandidate political committee to \$5,000 per election. 2 U.S.C. § 441a(a)(2)(A). However, expenditures supporting a federal candidate that are made independently of that candidate, her authorized committee, or her political party may be undertaken without limit. 2 U.S.C. § 431(17); Buckley v. Valeo, 424 U.S. 1 (1976). Thus, EMILY's List may make unlimited independent expenditures in support of the candidacy of Betty Sutton or in opposition to Thomas Sawyer. However, if such expenditures are "coordinated" with a campaign, those expenditures are subject to the contribution limitations described above.

The Commission's regulations define "coordination" at 11 C.F.R. § 109.20 through 109.23. The Commission's regulations were created in response to a directive in the Bipartisan Campaign Reform Act of 2002, and were recently amended in light of the recent Court of Appeals decision in Shays v. FEC, 414 F.3d 76 (D.C. Cir 2005). *Coordinated Communications*, 71 Fed. Reg. 33190 (June 8, 2006) (effective July 10, 2006).

Under the Commission's regulations, a communication made by a political committee is deemed to be coordinated if it meets all elements of a three-pronged test:

- (1) The communication is paid for by a person other than the candidate, candidate's authorized committee, or a political party committee;
- (2) The communication satisfies at least one of the content standards set forth in the Commission's regulations at 11 C.F.R. § 109.21(c); and

27044154007

(3) The communication satisfies at least one of the conduct standards set forth in the Commission's regulations at 11 C.F.R. § 109.21(d).  
11 C.F.R. § 109.21(a).

In this matter, no conduct undertaken by either the Sutton Campaign or EMILY's List meets the conduct prong of the Commission's regulations. The conduct prong of the Commission's regulations requires at least one of the following elements to be satisfied for a communication to be considered "coordinated."

- (1) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, political party committee or agent or the campaign committee or any of these entities or person's assent to a suggestion made by the person making the communication that such a communication be made;
- (2) The communication is made with the material involvement in decisions regarding the communication as to the content, intended audience, means or mode of communication, specific media outlet to be used, timing or frequency of the communication or size, prominence or duration of the communication (with respect to broadcast, cable or satellite);
- (3) There is substantial discussion about the communication between the person paying for the communication and the candidate, authorized committee, political party or agent of the campaign. A discussion is substantial if information about the candidate's plans, projects, activities or needs are conveyed and that information is material to the creation, production or distribution of the communication;
- (4) The person paying for the communication and the campaign shares certain types of common vendors, and that vendor uses or conveys information about the candidate's plans, projects activities or needs, or uses information in its possession that was obtained through their relationship with the candidate and that information is material to the creation, production or dissemination of the communication;
- (5) The person paying for the communication employs a former employee that conveys information about the candidate's plans, projects activities or needs, or uses information in its possession that was obtained through their employment with the candidate and that information is material to the creation, production or dissemination of the communication; or
- (6) A republished communication is distributed and one of the conduct standards described in sections (1) through (3) above are met.

11 C.F.R. § 109.21(d).

#### DISCUSSION

Allegations one and two do not allege any facts or even suggest any scenario that any prong, and specifically the third prong, of the coordination test described above has been met. With respect to the complaint's third allegation, the Sutton Campaign neither

27044154008

provided EMILY's List with the pictures used in the advertisements, nor did the Sutton Campaign have any prior knowledge of, nor had any discussion with, EMILY's List regarding the independent expenditures related to the use of the photographs attached to the complaint.

As demonstrated by the attached Declarations submitted by Betty Sutton, the federal candidate, and Anna Landmark, the Campaign Manager of the Sutton Campaign, neither Ms. Sutton nor any employee or agent of the Sutton Campaign made any request or suggestion that any communications that supported Ms. Sutton or opposed Mr. Sawyer be made. Furthermore, to the best of the respondents' knowledge, no former staff member of the Sutton Campaign has been employed by EMILY's List, nor has any vendor that has provided services to the Sutton Campaign participated in the dissemination of any communications made by EMILY's List. Finally, during Ms. Sutton's and Ms. Landmark's interactions with EMILY's List, each was informed that EMILY's list maintained an internal firewall to ensure that the representatives of EMILY's List that interacted with their campaign had no contact with the individuals and consultants that engaged in independent expenditures on behalf of EMILY's List.

The Commission's recently adopted amendments to its coordination regulations acknowledge a "firewall" as a safe harbor from the Commission's coordination regulations. In its Explanation and Justification of the new regulation, the Commission specifically acknowledged EMILY's List firewall as one that would specifically satisfy the Commission's requirements. *Coordinated Communications*, 71 Fed. Reg. 33190, 33206 (June 8, 2006). Therefore, EMILY's List properly constructed firewall negates the application of the Commission's conduct standard, and therefore, no coordinated communication could have been made by EMILY's List on behalf of the Sutton Campaign.

Allegation 1 –The complaint correctly notes that Betty Sutton was endorsed by EMILY's List and that biographical information about Betty Sutton could be found on EMILY's List website. However, the complaint makes no allegations that this information was used by EMILY's List for any independent expenditure, nor does the complaint allege any other facts that would tie this information to any conduct that would constitute coordination between EMILY's List and the Sutton Campaign. To be sure, EMILY's List and the Sutton Campaign had normal and legal limited contacts, but none of these contacts entailed the provision of any material information to EMILY's List by the Sutton Campaign that could have been used for any independent expenditure.

Allegation 2 – Allegation 2 merely notes that the Sutton Campaign and EMILY's List use the same UPS Store for their postal address. The complainants speculate that this fact somehow suggests that there is collusion between the two committees because the store is 60 miles away from Ms. Sutton's home. The complainants never explain how this fact demonstrates coordination. Moreover, the complaint fails to acknowledge that the UPS store is directly across the street from the campaign headquarters of the Sutton Campaign. Until this complaint was received from the FEC, the Sutton Campaign did not know that EMILY's List maintained a post office box at the UPS Store.

27044154009

Allegation 3 – Allegation 3 notes that pictures used by EMILY's List in its independent expenditures appear to derive from the website of the Sutton Campaign. However, the complaint alleges that the website pictures used by EMILY's list were "not of sufficient photographic quality to have been used to produce the image" that is contained in the attachments to the complaint. The complaint then speculates that photographic quality pictures used in the independent expenditures could not exist but for the "material involvement" of the Sutton Campaign. As demonstrated in the attached Declarations from Betty Sutton and Anna Landmark, the Sutton Campaign categorically denies that any photographs were provided to EMILY's List for any purpose.

It appears to the Respondents that the photographs used by EMILY's List for its mailings were derived from its publicly available campaign's website. Even if EMILY's List had used publicly available pictures that it downloaded from the Sutton Campaign website for use in EMILY's List's mailings, the use of those pictures would constitute coordination only if those pictures were provided either (1) at the request of; (2) used with the "material involvement," or (3) as a result of substantial discussion with the Sutton Campaign. 11 C.F.R. § 109.21(d)(6). In this instance, none of these elements exist. Simply put, the Sutton Campaign had no prior knowledge of, made no request of, nor had any substantial discussion with EMILY's List in connection with independent expenditures made by EMILY's List. Therefore, even if the use of the pictures constitute a "republication" of campaign material, the republication of the material does not constitute coordination because none of three conduct standards described above are satisfied. As stated in the attached affidavits, the Sutton Campaign did not independently provide pictures to EMILY's List, and we believe that the pictures used by EMILY's List in the mailings attached to the complaint were, in fact, taken from the Sutton Campaign website. Thus, the conduct standard has not been met in this matter, and no coordinated communication has resulted.

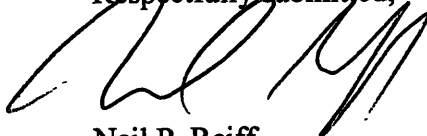
It should be further noted that the Commission's revised Coordinated Communications rules, which take effect on July 10, 2006, provide a safe harbor for use of public information. In this matter, the republication of pictures taken from the Sutton Campaign website would clearly fall under this newly created safe harbor as publicly available information. The Commission's Explanation and Justification of this new rule, at 71 FR 33205, describes recent amendments to 11 C.F.R. § 109.21(d)(2)-(5). Under this new rule, other than an actual request or suggestion that a communication be made, the content standards provide an absolute safe harbor when publicly available material is utilized in an independent expenditures. Of course, the main contention found in the complaint is that EMILY's List apparently utilized pictures found on the website of the Sutton Campaign. If this is the case, the Commission's safe harbor clearly protects such conduct.

27044154010

**CONCLUSION**

The facts and law in this matter demonstrate that any expenditures undertaken by Emily's List were independent of the Sutton campaign and were done so in full compliance with federal law and the Commission's regulations. Therefore, for the reasons stated above, the Commission should find no reason to believe any violation of federal law occurred and close the file in this matter.

Respectfully submitted,



Neil P. Reiff  
Stephen E. Hershkowitz  
Counsel to Betty Sutton, Betty  
Sutton for Congress and David  
Quolke as Treasurer

27044154011

**BEFORE THE  
FEDERAL ELECTION COMMISSION**

<b>IN RE</b>	)	
<b>Betty Sutton</b>	)	
	)	
<b>Betty Sutton for Congress</b>	)	
	)	<b>MUR 5743</b>
<b>and</b>	)	
	)	
<b>David Joseph Quolke, as Treasurer</b>	)	

**DECLARATION OF ANNA LANDMARK**

1. I am the Campaign Manager for Betty Sutton, a candidate for the United States House of Representatives from the 13<sup>th</sup> District of Ohio. Ms. Sutton was nominated by party primary election by the Democratic Party on May 2, 2006. Ms. Sutton will be a candidate for the general election on November 7, 2006.

2. During the primary campaign, Ms. Sutton was endorsed by a federal political committee called EMILY's List. As part of this endorsement process Ms. Sutton, the Sutton campaign and I have interacted with individuals associated with EMILY's List on general campaign topics, such as campaign contributions, as well as the provision of EMILY's List staff to our campaign shortly before the May primary campaign (which was disclosed as an in-kind contribution by the Sutton campaign and EMILY's List).

3. It is my understanding that those individuals that Ms. Sutton, myself and others associated with the campaign were in contact with at EMILY's List were

27044154012

“firewalled” off from any persons at EMILY’s List that were involved with the making of independent expenditures.

4. Nevertheless, I have never, nor to my knowledge has any other employee or agent of Betty Sutton for Congress, made any request or suggestion to EMILY’s List to undertake any independent expenditures in support of my campaign or in opposition to any opposing candidates.

5. I have not, nor to the best of my knowledge, has any employee or agent of Betty Sutton for Congress, had any material involvement, substantial discussions, or otherwise assented to any independent expenditures made by EMILY’s List in support of my campaign or in opposition to my opponents.

6. To the best of my knowledge, EMILY’s List has not utilized any common vendor of the Sutton campaign, nor has any former employee of the Sutton campaign been employed by EMILY’s List during the 2006 election cycle.

7. I have reviewed the mailings attached to the complaint filed in this matter. The pictures in these mailings appear to be pictures that were displayed on a public website maintained by the Sutton campaign. Neither myself, nor to the best of my knowledge, any other employee or agent of Betty Sutton for Congress, provided these pictures to EMILY’s List. Rather, it is my belief that EMILY’s List downloaded these pictures from the campaign’s public website.

27044154013



I declare under penalties of perjury that the foregoing is true and correct to the best of my present knowledge, information and belief. Dated this 27th day of June, 2006.

A handwritten signature in cursive script, appearing to read "Anna Landmark", written over a horizontal line.

Anna Landmark

27044154014

**BEFORE THE  
FEDERAL ELECTION COMMISSION**

**IN RE  
Betty Sutton**

**Betty Sutton for Congress**

**and**

**David Joseph Quolke, as Treasurer**

**MUR 5743**

**DECLARATION OF BETTY SUTTON**

1. I am a candidate for the United States House of Representatives from the 13<sup>th</sup> District of Ohio. I was nominated by party primary election by the Democratic Party on May 2, 2006. I will be a candidate for the general election on November 7, 2006.

2. During my primary campaign, I was endorsed by a federal political committee called EMILY's List. As part of this endorsement process I have interacted with individuals associated with EMILY's List on general campaign topics, such as campaign contributions, as well as the provision of EMILY's List staff to our campaign shortly before the May primary campaign (which was disclosed as an in-kind contribution by the Sutton campaign and EMILY's List).

3. It is my understanding that those individuals that I was in contact with at EMILY's List were "firewalled" off from any persons at EMILY's List that were involved with the making of independent expenditures.

27044154015

4. Nevertheless, I have never, nor to my knowledge has any other employee or agent of Betty Sutton for Congress, made any request or suggestion to EMILY's List to undertake any independent expenditures in support of my campaign or in opposition to any opposing candidates.

5. I have not, nor to the best of my knowledge, has any employee or agent of Betty Sutton for Congress, had any material involvement, substantial discussions, or otherwise assented to any independent expenditures made by EMILY's List in support of my campaign or in opposition to my opponents.

6. To the best of my knowledge, EMILY's List has not utilized any common vendor of my campaign, nor has any former employee of my campaign been employed by EMILY's List during the 2006 election cycle.

7. I have reviewed the mailings attached to the complaint filed in this matter. The pictures in these mailings appear to be pictures that were displayed on a public website maintained by my campaign. Neither myself, nor to the best of my knowledge, any other employee or agent of Betty Sutton for Congress, provided these pictures to EMILY's List. Rather, it is my belief that EMILY's List downloaded these pictures from the campaign's public website.

I declare under penalties of perjury that the foregoing is true and correct to the best of my present knowledge, information and belief. Dated this \_\_\_\_ day of June, 2006.

  
Betty Sutton

27044154016